Office Supreme Court, U. S.
FILED
OCT 27 1920
JAMES D. MAHER,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

JOSEPH W. NICHOLAS,

Appellant,

vs.

THE UNITED STATES.

No. 47[redacted]10

APPELLANT'S BRIEF.

WILLIAM E. RUSSELL,
L. T. MICHENER,
Attorneys for Appellant.

P. G. MICHENER,
Of Counsel.

THE REPORTER CO., WALTON, N. Y.
New York Office: 258 Broadway, Room 514. 'Phone 6575 Barclay.
Brooklyn Office: 375 Fulton Street, Room 58. 'Phone 2300 Main.
1920

Supreme Court of the United States

OCTOBER TERM, 1920.

JOSEPH W. NICHOLAS, Appellant. vs. THE UNITED STATES.	No. 47.

APPELLANT'S BRIEF.

Statement of the Case.

I.

The above case comes to this court on appeal from a judgment of dismissal entered in the Court of Claims. It is a companion case to the Norris case, number 48 on the calendar of this court, and the facts in the two cases are somewhat similar. As the law points applicable to this case have been fully discussed in the brief filed in the Norris case, counsel refers the Court to that case for points.

II.

Both Nicholas, the appellant above, and Norris were inspectors of customs in the port of Baltimore. Both were summarily, arbitrarily and unlawfully removed without charges on February 20th, 1913. Both were receiving $4.00 per diem at the time of their

removal. Norris was subsequently reinstated and again removed, but Nicholas, the claimant here, failed to secure restoration to his office at any time.

Nicholas was summarily ejected from office on February 20th, 1913, by the Collector of Customs pursuant to a letter from the Secretary of the Treasury (New Findings II). At that time he was in the classified civil service of the United States (New Findings II). It appears that on August 24th, 1911, a committee of special agents appointed by the Secretary of the Treasury to investigate the port of Baltimore made a report upon the conduct of the customs business at the said port. This report was filed with the Secretary of the Treasury and no action was taken thereupon in so far as same related to Nicholas, until February 20th, 1913. On that day Nicholas was summarily removed without charges and without being afforded an opportunity of defending himself (New Findings II). Nicholas had been appointed as an inspector of customs in the said port of Baltimore on January 28th, 1902, and had served continuously in such capacity at $4.00 per diem for a period of *eleven* years. He was never reinstated, and in this respect his case differs from the Norris case. He brought suit against the United States for the salary of his office accruing subsequent to his removal; his petition was filed May 23rd, 1916, three years after his removal (R. 1). His petition was dismissed in the court below and an appeal taken to this court.

III.

The Record Below.

Petition was filed in the court below May 23rd, 1916 (R. 1). By leave of court an amended petition was filed on October 17th, 1917 (R. 3). General

traverse was thereafter duly entered and filed (R. 4). The case was argued and submitted on March 6th, 1918. Findings of fact, conclusion of law and opinion of the Court were entered and filed May 13th, 1918 (R. 4). Petition was dismissed on the same date (R. 5 and 6), the traverse being sustained. Motion for new trial to remand the case to the general docket for the taking of testimony made June 11th, 1918 (R. 6). Motion for new trial was overruled by the Court below June 17th, 1918 (R. 6). Application for appeal was made and allowed July 16th, 1918 (R. 6). Motion to remand was made in the Supreme Court October 6th, 1919. Motion to remand granted by the Supreme Court and the lower court directed to set aside its judgment October 13th, 1919. New Findings of fact, conclusions of law and opinion in the court below March 8, 1920 (New Findings). Petition again dismissed on the same date. New record certified to this court at once.

ASSIGNMENT OF ERRORS.

The Court below erred:

First: In dismissing the petition.

Second: In not rendering judgment for the petitioner for the sum of $6,732.00 and for such additional amount as was due at the date of rendering judgment.

BRIEF OF ARGUMENT.

I.

This case is submitted upon the rules of law argued in the Norris case, No. 48, present term of this court.

It became necessary in this court to move for a remand of the record to the court below. The re-

mand having been granted and the judgment of the Court below having been set aside, proceedings were had below as though the case had never been tried. In the New Finding II it appears "that Nicholas was appointed to the customs service as an inspector in 1899; that he had been suspended for drinking; that he was rated number two by the surveyor and that he was charged with being at times indifferent, and again, as excellent." These charges were contained in the report of August 24th, 1911, and were buried for seventeen months, during which time the record is barren of any criticism of the plaintiff's conduct. The charges secretly made against this officer were most serious ones and assuredly he should have been afforded the opportunity of refuting them. Certainly the department, having waited seventeen months before acting upon the report, was in duty bound to apprise this claimant of the nature of these serious charges.

The Court below finds (New Finding II) that the plaintiff made no appeal to the Secretary of the Treasury for a restoration.

The Court finds (New Finding V) that the plaintiff was willing and physically able to assume the duties of his office and capable of discharging same, but that he did not apply for reinstatement or notify the proper department of his desire therefor or for revocation of the order of dismissal. The Court below finds that claimant's request for a finding that he did apply to the Collector of Customs and to the Chief Inspector of Customs for reinstatement and for the nature of the charges against him, to be not sustained by the evidence (New Findings V).

We submit that this claimant was unlawfully removed, and as there is no evidence in the record nor a finding to show that his position has ever been filled by another appointee, nor that the salary of his office has ever been paid to anyone else, he is entitled

to judgment. It is true that in New Finding III the Court below finds that there were only thirty-three positions of inspectors of customs in the District of Maryland authorized by law and that these positions are now filled and have been filled since 1913 by other persons. *There is nothing to show, however, that Nicholas' office was ever filled.* There was no evidence taken below, one way or the other, as to the thirty-three positions which the Court finds to be the fixed quota for the District of Maryland.

CONCLUSION.

Wherefore, it is submitted that the judgment of the Court below should be reversed and that judgment to the plaintiff be awarded for the full salary of his office accruing since the date of his unlawful removal.

Respectfully submitted,
WILLIAM E. RUSSELL,
L. T. MICHENER,
Attorneys for Appellant.

P. G. MICHENER,
Of Counsel.